

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of)
)
Closed Captioning and Video Description)
of Video Programming)
)
Implementation of Section 305 of the)
Telecommunications Act of 1996)
)
Video Programming Accessibility)

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MM Docket No. 95-176

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APR 19 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REQUEST FOR CLARIFICATION OF CBS CORPORATION

CBS Corporation ("CBS") hereby respectfully requests clarification of the Commission's Order on Reconsideration in the above docket with respect to the obligations of those program providers that used electronic newsroom (ENR) captioning during the first six months of 1997 and will not be permitted to count ENR captioning toward the applicable captioning benchmarks beginning January 1, 2000. Specifically, CBS seeks a clarification that these program providers will be permitted to continue using ENR captioning to fulfill their obligation to caption substantially the same amount of live programming as they captioned using this method in 1997, as long as they otherwise meet their applicable captioning benchmarks.

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THE COMMISSION SHOULD CLARIFY THAT PROGRAM PROVIDERS THAT USED ENR CAPTIONING FOR LIVE PROGRAMMING DURING THE FIRST HALF OF 1997 MAY CONTINUE TO USE ENR CAPTIONING TO CAPTION THIS PROGRAMMING STARTING IN THE YEAR 2000, EXCEPT AS NECESSARY TO COMPLY WITH THEN APPLICABLE BENCHMARKS

In its 1997 Report and Order, the Commission ruled that, during the transition schedule phasing in closed captioning requirements, video programming providers would be required to continue to provide captioning at a “level substantially the same as the average level of captioning that they provided during the first six months of 1997.”¹ The purpose of this “no backsliding” rule was “to make sure that the level of captioning is generally increasing.”²

At the same time, the Commission ruled that it would not place any limits on the methodology used to create closed captions, and specifically stated that it would permit the use of electronic newsroom (ENR) captioning.³ ENR captioning creates captions directly from scripted text that appears on newsroom teleprompters, and therefore does not caption unscripted material. Despite its acknowledged inferiority to real-time captioning, in which the entire audio track of a program is transcribed verbatim, the Commission permitted use of ENR captioning in recognition of the cost and scarcity of real-time captioning services.⁴

More than a year later, in its Order on Reconsideration, the Commission partially reversed its earlier decision and determined that, with respect to certain major program providers, programming captioned using the ENR method would no longer count toward the providers’

¹ Implementation of Section 305 of the Telecommunications Act of 1996, 13 FCC Rcd 3272, 3294-95 (1998) (“Report and Order”).

² Id.

³ Id. at 3311.

⁴ Id.

compliance with the applicable captioning benchmarks. Under the new ruling, as of January 1, 2000, the four major broadcast networks, the broadcast stations affiliated with these networks in the top 25 television markets, and certain other providers will not be permitted to count ENR-captioned programs as being "captioned" for purposes of the Commission's rules. Twelve of CBS's fourteen owned and operated television stations fit within the categories affected by this change.

While this ruling makes clear that the affected providers will not be able to rely on ENR captioned programs to meet their captioning benchmarks in the future, it also raises a question as to what these programmers' obligations will be with respect to programming that they captioned using the ENR method during the first six months of 1997. Many of the CBS stations voluntarily provided captions using the ENR method in their local news programming during this period.

As discussed below, CBS believes that to require providers who *voluntarily* captioned programming through the ENR method during 1997 to now caption the same amount of programming using real-time captioning services -- where they are otherwise meeting the applicable benchmarks -- would be a highly unfair result, not supported by the Commission's reasoning in either the original Report and Order or the Order on Reconsideration. An order clarifying that providers will not be placed under such an obligation is needed because of recent statements by Commission staff. In discussions with communications industry lawyers, Commission staff members, after initially indicating that the question had not been considered by the FCC in its Order on Reconsideration, expressed the view that those providers who used ENR captioning during the first half of 1997 must provide real time captioning for a similar amount of

programming under the “no backsliding” rule, irrespective of whether they are otherwise meeting the Commission’s captioning benchmarks.

CBS submits that it would be highly unfair to require providers who voluntarily captioned programming through the ENR method during the 1997 time period to caption the same amount of programming using more costly and scarce real-time captioning services⁵ where they are otherwise meeting the applicable benchmarks. To place an additional burden on these otherwise compliant providers to use real time captions -- because they provided ENR captioning at a time when they were under no obligation to do so -- would have the effect of imposing costly additional obligations on them now for previously having taken voluntary actions in the public interest.

Nothing in either the original Report and Order or the Order on Reconsideration necessitates this harsh result. In creating the “no backsliding” rule, the Commission recognized that there were program providers who were captioning significant amounts of their

⁵ The FCC estimates that captioning *one hour* of programming daily in real time adds from \$43,000 to \$438,000 to a television station’s annual costs. See Report and Order, 13 FCC Rcd at 3312, n.256. Moreover, the Commission has expressly recognized that qualified stenocaptioners are currently in limited supply, particularly in certain areas. This means that local stations wishing to provide real time captioning of their programming (such as CBS Owned stations in New York, Baltimore, Miami and San Francisco) often have been forced to rely on captioning agencies located in distant cities, to which they must relay the audio and (ideally) the video of the program in question by telephone wire, and in turn receive the captions back from the captioning agency. This adds significantly to the total costs of real time captioning. Report and Order, *supra*, 13 FCC Rcd at 3311.

programming even in the absence of any specific obligation to do so. The Commission realized that until some point during the transition period set forth in the Report and Order, these providers could actually cut back on their captioning and still be in compliance with the transition benchmarks. The “no backsliding” rule ensured the Commission’s objective that the initiation of the transition did not result in a decrease in captioning.

But it is not necessary to the accomplishment of the goal of preventing a reduction of captioning by these responsible program providers to force them, starting in January, to provide real-time captioning for all the programming that they captioned using ENR captioning during the first six months of 1997 -- that is, to exceed their 1997 performance despite the fact that they otherwise more than meet the Commission’s transition benchmarks. Such a result would have the anomalous effect of penalizing such providers for their earlier voluntary good acts.

Notwithstanding the recent comments by staff members, the record does not indicate that the Commission intended this inequitable result. In its Order on Reconsideration, after setting out its new rule prospectively prohibiting specified providers from counting ENR captioning toward compliance with the benchmarks, the Commission stated: “We encourage such providers to use real-time captioning even when it would not otherwise be required.” (Emphasis supplied).⁶ While it thus encouraged those who used ENR captioning in the past to switch to real-time captioning, the Commission appeared to indicate that it would only be those

⁶ Order on Reconsideration in MM docket No. 95-176, (adopted September 17, 1998; released October 2, 1998) (“Order on Reconsideration”) at ¶ 40.

who used real time captioning during the first half of 1997 who would be expected to use it in the year 2000:

[W]e expect that video programming providers that have used real-time captioning in the past will likely continue to use this methodology for programming captioned to comply with the requirement that the captioning levels be maintained at substantially the same level as was offered during the first six months of 1997.⁷

We submit that the logical inference from the Commission's statement that those who had used real-time captioning in the past would be expected to continue doing so is that those who had used ENR captioning in the past – while encouraged to switch to real-time captioning – would not be required take this step, unless necessary to meet the applicable benchmarks.

It is important that the affected program providers obtain a clarification of their obligations soon. Because of the cost and scarcity of real-time captioning services, it would be difficult and time consuming for all the affected providers to find and retain the captioning services that would be needed at the beginning of next year if they are obligated to replace their 1997 ENR captioning with real-time captioning. In the absence of an order clarifying that they are not obliged to do so, they will be forced to begin these efforts soon. A clarification from the Commission is needed to eradicate the uncertainty that now exists and allow program providers to rationally plan their future captioning efforts.

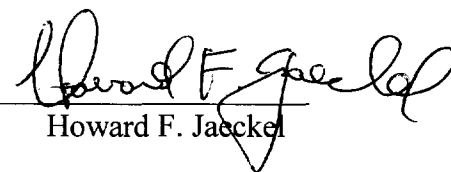
⁷ Id. at ¶ 41

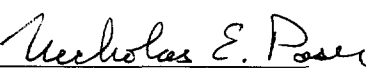
CONCLUSION

CBS submits that it would be clearly unfair and inconsistent with the views expressed by the Commission in its original Report and Order and its Order on Reconsideration to require program providers that otherwise meet the transition benchmarks to substitute real-time captioning for the ENR captioning they voluntarily provided in 1997. An order to this effect is needed to guide Commission staff.

Respectfully submitted,

CBS Corporation

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April 16, 1999

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